Board Diversity: Australian and German Perspectives

Jean J. du Plessis**

1 Introduction

In this paper I will focus on board diversity generally, but because of the importance of gender diversity, it is mentioned more often in this paper than other forms of board diversity. The general aim with this paper is to give an overview of some arrangements in place in Australia and Germany to ensure board diversity. The focus will also be on areas where progress have been made and initiatives taken in Australia and Germany to improve board diversity. It is in fact a very delicate balance that needs to be achieved if a company wants to get the board diversity right in order to ensure that the company performs optimally. Literature supports the view that virtually no board diversity (say all directors are middle-aged men with only accounting backgrounds) or too much board diversity (say a board of six consisting of six different nationalities, coming from 6 different career backgrounds and varying in age from 18 years to 70 years) may both not be ideal.1 It is a good and well-motivated and considered board composition that will achieve the best results, but achieving the right balance is challenging.2

2 Australia

2.1 Overview

The fact that in most Australian company boards there was a gender imbalance in favour of men has never been disputed. All data available shows this very clearly and that the gender balance is still not right is obvious – see data below. However, especially since 2010, there have been serious efforts to make sure that more women are appointed to Australian boards. The gender imbalance on boards is currently addressed by the ASX’s voluntary code of corporate governance, but if the right balance is not going to be achieved it is not difficult to predict that, like in some other countries, mandatory quotas of women on Australian boards will be dictated by legislation.

2.2 ASX Corporate Governance Council: 2010 Amendments to the 2007 Corporate Governance Principles and Recommendations

2.2.1 Overview

In 2010 several amendments were made to the 2007 Corporate Governance Principles and Recommendations.3 These amendments also informed by the 2009 Report on Diversity on Boards prepared by the Australian Government’s Corporations and Markets Advisory Council.

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1 See AICD, Company Directors Course Material, AICD, Sydney (2010), Module 8, 39 of 61, referring to N Adler, International Dimensions of Organisational Behaviour, South Western, Canada (2002) at 144-142 and 145.

2 See AICD, Company Directors Course Material, AICD, Sydney (2010), Module 8, 40 of 61 et seq.

Committee (CAMAC). Several of these changes deal with board diversity. Recommendation 3.2 currently reads as follows:

Companies should establish a policy concerning diversity and disclose the policy or a summary of that policy. The policy should include requirements for the board to establish measurable objectives for achieving gender diversity for the board to assess annually both the objectives and progress in achieving them.

The ASX Corporate Governance Council suggested that the establishment of a diversity policy should be done in the financial year commencing 1 July 2010. As far as the ASX Corporate Governance Principles and Recommendations are concerned, it was made clear that diversity includes, but is not limited to, gender, age, ethnicity and cultural background. The measurable objectives should identify ways in which the achievement of gender diversity is measured, for example, the proportion of women employed by (or consultants to) the company, in senior executive positions and on the board. Where companies establish a diversity policy, they should also introduce appropriate procedures to ensure that the policy is implemented properly, which may include additional measurable objectives in relation to other aspects of diversity as identified in the policy. There also should be an internal review mechanism to assess the effectiveness of the policy.

Box 3.2 of the ASX Corporate Governance Principles and Recommendations contains some suggestions for the content of a diversity policy. It is clear that the suggestions are not only aimed at gender diversity at board level, but diversity generally at all levels. It is suggested that companies should articulate their commitment to diversity the corporate benefits arising from employee and board diversity and the importance of benefiting from all available talent. It is suggested that this should promote an environment conducive to the appointment of well-qualified employees, senior management and board candidates so that there is appropriate diversity to maximise the achievement of corporate goals.

The fact that the focus is not on gender diversity only is also confirmed by the suggestion that there should be a commitment to and identification of ways to promote a corporate culture which embraces diversity when determining the composition of employees, senior management and the board, including recruitment of employees and directors from a diverse pool of qualified candidates. Skills development such as executive mentoring programs or more targeted practices relating to career advancement such as those that develop skills and experience that prepare employees for senior management and board positions will also enhance the skills diversity of ordinary employees, managers, senior executives and board members.

2.2.2 Gender diversity
Recommendation 3.4 deals specifically with gender diversity:

Companies should disclose in each annual report the proportion of women employees in the whole organisation, women in senior executive positions and women on the board.

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5 Box 3.2 of the ASX Corporate Governance Principles and Recommendations.
It is explained that diversity is an economic driver of competitiveness for companies. It is also pointed out that research has shown that increased gender diversity on boards is associated with better financial performance, and that improved workforce participation at all levels positively impacts on the economy. Kang, Cheng and Gray point out that there has been mixed evidence and constant debate regarding the effect of board composition on corporate performance. However, they point out that board diversity is still considered to be desirable, because it results in more balanced board discussions.

The ASX Corporate Governance Principles and Recommendations suggest that the promotion of gender diversity broadens the pool for recruitment of high quality employees, enhances employee retention, encourages greater innovation, and improves corporate image and reputation. Reporting on the diversity profile of the company facilitates greater transparency and accountability in relation to the policy that has been put in place, together with the objectives to be achieved by the company. Companies should consider, in the context of the economic group controlled by the company, how best to report to achieve an accurate and not misleading impression of the relative participation of women and men in the workplace and the roles in which they are employed: for instance, whether a full-time equivalent measure is appropriate in all or some circumstances as opposed to clear categorisation of full-time, part-time and contracted services, and whether the participation is in a leadership, management, professional speciality or supporting role, or by relative participation of men and women at different remuneration bands. The board, or an appropriate board committee, for instance the nomination or remuneration committee, should be charged with the duty, at least annually, to review and report on the relative proportion of women and men in the workforce at all levels of the economic group controlled by the company. This obligation should be included in the charter of the board or the relevant board committee.

Recommendation 3.5 makes reporting on diversity ‘comply or explain’ provisions – the reporting should be included in the corporate governance statement in the annual report. It is then provided that the following material should be made publicly available, ideally by posting it to the company’s website in a clearly marked corporate governance section:

- any applicable code of conduct or a summary
- the diversity policy or a summary of its main provisions.

In recent time several initiatives were undertaken in Australia to increase the skills base of women in Australia and to ensure that more women are appointed to boards. The changes to the ASX’s Principles and Recommendations above have clearly this aim in mind. In 2010 the Business Council of Australia (BCA) established a one-year pilot mentoring program for high-achieving women within the BCA member companies, called the “C Suite” Project. The project involved BCA members in personally mentoring women employed by other BCA member companies. This kind of one-on-one mentoring by people at the top aims to open up

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6 ASX Corporate Governance Principles and Recommendations, Commentary on Recommendation 3.4 – p 26.
8 Ibid 194-195.
9 ASX Corporate Governance Principles and Recommendations, Commentary on Recommendation 3.4 – p 26.
pathways for talented women to rise up the corporate ladder. A similar initiate was taken by the Australian Institute of Company Directors (AICD), called the Mentoring Program. It was first launched in April 2010. The Program involves leading chairmen and directors working with highly talented and qualified women in a 12-month mentoring relationship. It is a practical and concrete measure designed to help achieve a greater representation of women on boards. Other initiatives of the AICD include the Board Ready Program, Board Diversity Scholarship Program and several places reserved for women on the AICD’s Company Directors Course, which they may attend without paying the course fee of SAUD5,400 for those who are members of the AICD.

Real-time statistics collated by the Australian Institute of Company Directors in October 2010 show that:

- women then represented 10.1 per cent of directors of ASX200 boards, up from 8.3 per cent at the beginning of 2010 and higher than the 8.4 per cent figure stated in the Equal Opportunity for Women in the Workplace Agency (EOWA) Census;
- a total of 40 women directors have been appointed up to October 2010, compared to only ten for the whole of 2009;
- 27 per cent of directors appointed up to October 2010 have been female, compared to only 5 per cent in 2009 and 8 per cent in 2007 and 2008;
- there were then six female chairs (one more than noted by EOWA) and seven female CEOs (one more than noted by EOWA);
- 37 companies then had two or more women on their boards (11 more than noted by EOWA);
- the proportion of companies with no women on their boards has fallen from 54 per cent as recorded in the 2010 EOWA Census to 46.5 per cent; and
- a total of 93 boards still did not have any women directors (fifteen less than noted by EOWA) by October 2010.

Up to May 2011, 79 boards in the ASX 200 still did not have any women, but this was a significant improvement as in the beginning of 2010 there were 115 ASX 200 companies.

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without any women on their boards. In August 2011 the following statistics were provided by the AICD:

- Women made up 17.6% of directors of ASX 50 companies, 16.1% of ASX 100 companies and 12.7% of ASX 200 companies (it was said at that stage by the AICD chairmen, John Colvin, that ‘Australia now ranks ahead of many of our international peers in gender composition of top listed company boards, including the United Kingdom, Canada and New Zealand’;
- Up to August 2011, women have comprised an average of 29% of all new appointments to ASX 200 companies, compared to only 5% in 2009 and 8% in 2007 and 2008;

It is easy to predict that more women will be appointed on Australian boards in future. On the one hand this is driven by the reporting requirement on the number of women employees and directors. On the other hand, there is also investor pressure that more women should be appointed to boards.

2.3 Summary and analysis

The debate on board diversity in Australia is dominated by gender diversity. However, it is clear that gender diversity is seen in the broader context of board diversity generally, including age, ethical and cultural diversity. In 2010 the ASX Principles and Recommendation were amended to ensure that listed companies develop a diversity policy and that a summary of that policy should be disclosed. There should also be procedures in place to ensure compliance with the diversity policy. Box 3.2 of the ASX Principles and Recommendations contain some specific suggestion what issues should be dealt with in a diversity policy. As far as gender diversity is concerned, listed companies should disclose in each annual report the proportion of women employees in the whole organisation, women in senior executive positions and women on the board. This is an ‘if not why not?’ provision, meaning that companies will have to explain if they do not disclose the information. Several initiatives by the BCA and the AICD are aimed at not only giving women exposure to senior executive function and board functions but also providing women the opportunity to attend directors training courses.

The statistics show that there are still not many women serving on the boards of ASX200 companies. However, there are strong indications that this is busy changing rapidly.

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3 Germany

3.1 Overview of the German two-tier board system and employee participation at supervisory boards level

Three organs are required for German public companies (AGs). They are the general meeting (Hauptversammlung), the supervisory board (Aufsichtsrat) and the management board (Vorstand). For private companies (Gesellschaften mit beschränkter Haftung (GmbHs)), only two organs are required: the management organ (comparable to the management board in the AG) and the organ for the corporators (comparable to the general meeting in the AG) but codetermination legislation also makes a supervisory board compulsory for some larger GmbHs. Reference to the German two-tier board system implies a reference to the supervisory board and the management board.

When one analyses the German two-tier board system one should never lose sight of the fact that the supervisory board was introduced into the German law of public corporations by the General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch, ADHGB) of 1861. In other words, more than 150 years of development and refinement have taken place since its origin. It is, therefore, no wonder that some commentators would perceive the German corporate governance model as complicated or unnecessarily technical. Employees were allowed to appoint representative to the supervisory boards of companies between 1922-1934. However, the main impetus for employee participation at supervisory board level (codetermination) was forced upon Germany by the Allied Forces after the 2nd World War and became embedded in the German corporate governance model in 1951.

The two-tier board system and the system of employee participation at supervisory board level, also called codetermination or supervisory codetermination by employees, developed separately in Germany. As mentioned, the two-tier system had already been introduced by the General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch):

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16 This part is based on extracts from Jean J du Plessis et al, German Corporate Governance in International and European Context, Springer Verlag, Heidelberg (2nd ed, 2012) Chapters 1, 4 and 5. These Chapters were co-authored with Prof. Dr. Bernard, Großfeld, Prof. Dr. Ingo Saenger and Prof. Dr. Otto Sandrock, all from the University of Muenster and I would specifically like to recognize their considerable contributions to both these chapters.


18 See discussion about codetermination in Chapter 5.

19 See also 5.2.3.1.

20 ADHGB 24 July 1861 with effect from 1 March 1862—see Rudolf Wiethölter, Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht (CF Müller Verlag, Karlsruhe 1961) 271. It is uncertain whether the requirement for having a supervisory board for AGs was influenced by developments concerning the Kommanditgesellschaft auf Aktien (KGaA)—see Wiethölter 281–85.


22 Ibid 152-152.
ADHGB) of 1861 and was made compulsory in 1870\textsuperscript{23} though only for AGs and not yet for GmbHs, which were regulated in a special statute of 1892 (i.e. about thirty years later).\textsuperscript{24} One thing is certain: even if the different explanations for introducing the supervisory board in German law are apprehended,\textsuperscript{25} the inception of the supervisory board was not motivated or even affected by the urge to recognise or to accommodate the interests of employees. In fact, the statutory history of supervisory codetermination by employees goes back to 1922 and that of parity employee representation at supervisory board level to 1951.\textsuperscript{26} This means that more than 80 years stand between the introduction of the two-tier board system and the system of parity employee participation at supervisory board level. However, in Germany employee participation at supervisory board is nowadays seen as an inherent part of corporate governance in Germany and as very important way of recognising the interests of very important stakeholders, namely the employees. The stakeholder debate has always been central to the corporate governance debate in Germany. Perhaps, because of codetermination, probably more so than in most other countries based on the shareholder primacy model.\textsuperscript{27}

However, the original skepticism about supervisory codetermination later turned into praise. Since the early 1960s until quite recently the concept of codetermination has been viewed—at least publicly—quite positively in Germany, not only by labour but also ‘as a source of pride’ by managers and politicians.\textsuperscript{28} Whereas employee participation at

\textsuperscript{23} ADHGB 24 July 1861 with effect from 1 March 1862—see Rudolf Wiethölter, Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht (CF Müller Verlag, Karlsruhe 1961) 271. It is uncertain whether the requirement for having a supervisory board for AGs was influenced by developments concerning the Kommanditgesellschaft auf Aktien (KGaA)—see Wiethölter 281–85.

\textsuperscript{24} The statute is named ‘Act on Private Limited Companies’ (Gesetz betreffend die Gesellschaften mit beschränkter Haftung).

\textsuperscript{25} As to the reasons why the Aufsichtsrat was first introduced into the German law, Rudolf Wiethölter, Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht (CF Müller Verlag, Karlsruhe 1961) 271 refers to two completely contradictory conclusions reached by two commentators (Passow and Schumacher), relying on exactly the same research sources.

\textsuperscript{26} Montan-MitbestG (1951)—see Friedrich Kübler and Heinz-Dieter Assmann, Gesellschaftsrecht (6th ed, CF Müller Verlag, Heidelberg 2006) 520 (fn 3).

\textsuperscript{27} See Helen Kang, Mandy Cheng and Sidney J Gray, Corporate governance and board composition: Diversity and independence of Australian boards’, (2007) 15 Corporate Governance: An International Review 194 at 195 who start to acknowledge the importance of stakeholders when board diversity is concerned, unfortunately they do not take that point any further.

supervisory board level was originally seen only as a method to impede revolutionary
employee techniques, it was later identified and even praised as one of the most effective
ways through which the valuable contribution of labour, as a production factor, could be
recognised. Even today there are still strong views on the positive aspects and positive
influence of codetermination. Also, recent studies have found evidence of good co-operation
between shareholder and employee representatives on supervisory boards.

It is significant to note that the realisation of the positive effects of codetermination evoked
considerable new interest in the role of the supervisory board, not only as an organ to
supervise and oversee the functions of the management board, but also as an organ through
which a broader spectrum of corporate interests was represented. These developments,
which generated an independent velocity, in turn provide the reason why it is not so easy to
draw sharp distinctions between the concept of supervisory codetermination and the concept
of the two-tier board system in Germany nowadays—they developed separately, but are now
almost inextricably linked to each other.

The German system of codetermination, though still mostly disliked or even rejected in
German business circles, the concept of codetermination shows signs of greater acceptance,
though not in its present shape but in a modified, much more flexible form, tailored to the
needs of specific types of corporations. It is quite remarkable that foreign businessmen who,
until recently just could not comprehend the concept of codetermination and who were
astounded by the complex and extensive German rules regarding codetermination, now seem
to begin to understand that these codetermination rules are embedded in a more
comprehensive system of mostly friendly labour relations—relations which have helped
Germany recover fast and thoroughly from the global financial crisis (GFC) of 2007-2008
and the European financial crisis of 2009-2011. That recovery is attributed—to a large
extent—to Germany’s well functioning labour relations, including its system of
codetermination.

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Journal of Comparative Law (AJCL).
30 See in general Rudolf Wiethölter, Interessen und Organisation der Aktiengesellschaft im amerikanischen
und deutschen Recht (CF Müller Verlag, Karlsruhe 1961) 300.
32 Andrew Johnston, EC Regulation of Corporate Governance (CUP, Cambridge 2009) 99. See also the
‘Concluding Remarks’ in 6.8.
33 Max van Drunen, Funktionsdefizite in Regelungen zum Aufsichtsrat im deutschen und im niederländischen
34 Cf Hans-Joachim Mertens, ‘Zuständigkeiten des mitbestimmten Aufsichtsrats’ (1977) 6 ZGR 272–75,
289; Stephen Laske, ‘Unternehmensinteresse und Mitbestimmung’ (1979) 8 ZGR 172–73, 200; Ulrich
Unternehmensinteresse’ in Fritz Reichert-Facilides, Fritz Rittner and Jürgen Sasse (eds) Festschrift für Reimer
Schmidt (Verlag Versicherungswirtschaft eV, Karlsruhe 1976) 103 et seq provides an interesting exposition of
the historical development and the importance the concept of ‘corporate interests’ in German law.
35 See Jean J du Plessis et al, German Corporate Governance in International and European Context, Springer
Verlag, Heidelberg (2nd ed, 2012) at 150 and 174-175.
3.2 The supervisory board

3.2.1 Necessity and composition

As general rule it could be stated that all public companies and all private companies with more than 500 employees must have a supervisory board. The right to appoint members of the supervisory board varies according to the type of business form used, the number of employees employed, the size of corporations’ stated share capital, the specific sphere of business the corporation is involved in, and also, to a certain extent, according to the provisions in the articles of incorporation (Satzung) in the case of companies not falling under codetermination legislation. There are basically four different systems applying to the composition of supervisory boards in Germany:

1. In public corporations where employee participation is not made compulsory, all members of the supervisory board are appointed by the general meeting or in accordance with provisions in the articles of incorporation.

2. For certain types of corporations it is required that one-third of the supervisory board must be appointed by the employees or their representatives and two-thirds by the general meeting or in accordance with provisions in the articles of incorporation or comparable documents (die Satzung, der Gesellschaftsvertrag oder das Statut).

3. For other types of corporations half of the members are appointed by the employees or their representatives, the other half by the shareholders, and then one neutral member has to be appointed by the two groups together.

4. For a final group of corporations an equal number of representatives are appointed by the employees or their representatives and the shareholders. In addition, for the corporations

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36 This part is based on extracts from Jean J du Plessis et al, *German Corporate Governance in International and European Context*, Springer Verlag, Heidelberg (2nd ed, 2012) Chapters 4 and 5. These Chapters were co-authored with Prof. Dr. Ingo Saenger and Prof. Dr. Otto Sandrock, both from the University of Muenster and I would specifically like to recognize their considerable contributions to both these chapters.


38 S 101(2) AktG. The articles of incorporation (Satzung) may also prescribe specific requirements or qualifications for the members of the supervisory board appointed by the general meeting—S 100(4) AktG. See generally Johannes Semler, ‘The Practice of the German Aufsichtsrat’ in Klaus J Hopt, Hideki Kanda, Mark J Roe, Eddy Wymeersch and Stefan Priggle (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (OUP, Oxford 1998) 269–70.


41 These members will normally be appointed by the general meeting, but the articles of incorporation may provide for special procedures and requirements in this regard (S 8(1) MitbestG) such as the appointment by a specific person or institution (normally a major creditor).

42 See Jean J du Plessis et al, *German Corporate Governance in International and European Context*, Springer Verlag, Heidelberg (2nd ed, 2012) Part 5.2.3.3.

43 The German law classifies the employees in different categories—see Jean J du Plessis et al, *German Corporate Governance in International and European Context*, Springer Verlag, Heidelberg (2nd ed, 2012) Part 5.4.2.

44 S 8(1) MitbestG.
falling under this system, the chairperson (with a casting vote) must be elected from the group of persons appointed by the general meeting, while the employee representatives must include at least one person from ‘the leading personnel’ (managers and executive employees).45

3.2.2 Appointment of supervisory board members
Supervisory board members are normally appointed for a period of five years.46 However, the German Corporate Governance Code (GCGC) now suggests that first-time appointments should not be for five-years.47 It has been reported that in the past supervisory board members basically stayed the same for many years as their terms of appointment were almost always automatically renewed and the removal or termination of their offices were of academic interest only.48 Although management board members were not allowed to nominate candidates for the supervisory board,49 in practice, the management board heavily influenced the selection process and appointment procedure of shareholder representatives to the supervisory board.50

Some of these concerns were addressed in 2007 by way of a new provision added to the GCGC. Under Article 5.3.3 it is expected (‘comply or explain’ provision) of the supervisory board to form a nomination committee composed exclusively of shareholder representatives. This nomination committee must now propose suitable candidates to the supervisory board, which will in turn recommend their (shareholder representatives) appointment to the general meeting. Almost three out of four interviewed supervisory board members in the annual survey of supervisory board members (2008) supported such a bigger influence of the supervisory board in search of proper candidates for the supervisory board.51

3.2.3 Requirements to ensure diversity in supervisory board composition
Under the GCGC it is expected of supervisory boards of listed companies to specify concrete objectives regarding the composition of the supervisory board, taking into account four specific criteria, namely

1. the particular needs of the enterprise;
2. international activities of the enterprise;
3. potential conflicts of interest; and

45 See generally the table by Brian Robinson, ‘Worker participation: Trends in West Germany’ in Mark Astey (ed), Worker Participation (Juta & Co Ltd, Durban 1990) 52. See also ‘Foreword’ to the GCGC.
49 S 124 (3) AktG.
4. the age limit (they must specify it) for supervisory board members.\textsuperscript{52}

Because it is not stated explicitly, there seems to be uncertainty whether these objectives and criteria only apply to the shareholder representatives or whether they apply to both shareholder representatives and employee representatives sitting on the supervisory board.\textsuperscript{53} It is, however, suggested that it will defeat the purpose of these objectives and criteria if they only apply to shareholder representative and not to employee representatives. The requirement of conflicts of interest is somewhat problematic in the case of employees serving on supervisory boards.\textsuperscript{54} In addition, it should be remembered that there is a natural barrier that makes it more difficult for nationality diversity to be achieved at supervisory board level. That is namely that the employees representatives on the supervisory board are appointed by the employees and as their nationality would be primarily German, it is not surprising that a study found that nationality diversity among supervisory boards is much lower than on management boards.\textsuperscript{55} This will probably lead to more pressure in future that the shareholder representatives on supervisory boards should also include non-Germans to ensure nationality diversity.

The GCGC expects of companies to develop specific objectives and, in particular, anticipate an appropriate proportion of female representatives (\textit{eine angemessene Beteiligung von Frauen vorsehen}) on the supervisory board.\textsuperscript{56} These provisions already had German companies announce quotas for females soon after they were announced.\textsuperscript{57} The issue of appointing more women on supervisory boards will remain a hotly debated issue in Germany over the next few years because women will probably get frustrated if not appointed sooner rather than later, but current supervisory board members cannot simply be removed before the expiration of the period of appointment to make place for women.\textsuperscript{58} It will probably mean that the actual impact of the aspiration to have more women appointed on supervisory board will be seen three year after these provisions were added to the GCGC in 2010. Thus

\textsuperscript{52} Art 5.4.1 (2\textsuperscript{nd} paragraph, 1\textsuperscript{st} sentence) GCGC. See generally Hans-Christoph Ihrig and Manuel M Meder, ‘Die Zuständigkeitsordnung bei Bennennung der Ziele für die Zusammensetzung des Aufsichtsrats gem. Ziff. 5.4.1 DCGK n.F. in mitbestimmten Gesellschaften’ (2010) 31 ZIP 1577.

\textsuperscript{53} Ibid.

\textsuperscript{54} See Jean J du Plessis et al, German Corporate Governance in International and European Context, Springer Verlag, Heidelberg (2\textsuperscript{nd} ed, 2012) at 104.

\textsuperscript{55} See Kees van Veen aand Janine Elbertsen, ‘Governance regimes and nationality diversity in boards: A comparative study of Germany, the Netherlands and the United Kingdom’ (2008) 16 Corporate Governance: An International Review 386 at 384 – the authors explanation this peculiarity of the German supervisory board very well on pp 389-390.


\textsuperscript{58} In 2010 only 11 % of all supervisory board members of the big DAX-Companies were female and only 4 % of all supervisory board members were female shareholder representatives, cf Christian Strenger ‘Wichtige Neuerungen im Deutschen Corporate Governance Kode aus Sicht institutioneller Investoren’, (2010) 36 NZG 1403.
probably in 2013 or 2014, because by then most of the current supervisory board members would have reached the end of their current periods of appointment.59

The fundamental problem of a lack of gender diversity on German supervisory boards is illustrated by the fact that in 2004 only 96 (3%) of the 2870 shareholder representative positions on supervisory boards position were held by women, while men held 2850 (97%) of these shareholder representative position. Only 338 (12%) of these positions were held by foreigners.60 As far as employee representatives are concerned, men held 1464 (84%) of these positions, while women only held 286 (16%) of these positions.61 Whereas the use of German as language could be given as reason for not appointing more non-Germans, there seems to be no justification why so few women were appointed to supervisory boards in the past.

3.2.4 Requirements to ensure diversity in supervisory board composition

There is also an attempt to improve board diversity in supervisory board with the appointment of independent directors. This is, as have been mentioned above a problem as far as employees sitting on the supervisory board is concerned, but for the shareholder representatives independence is aspired for. Article 5.3.2 provides that the chairperson of the audit committee should be independent and not be a former member of the management board of the company whose appointment ended less than two years ago.

No specific percentage of independent supervisory board members is prescribed, for the reason that employee representative cannot be independent, but article 5.4.2 of the GCGC provides that the supervisory board shall include what it considers ‘an adequate number of independent members’ to permit the Supervisory Board's independent advice and supervision of the Management Board. In the same article it is stated that a supervisory board member is considered independent if he/she has no business or personal relations with the company or its management board which cause a conflict of interests. Not more than two former members of the management board shall be members of the supervisory board and supervisory board members shall not exercise directorships or similar positions or advisory tasks for important competitors of the enterprise. In addition, article 5.4.4 provides that management board members may not become members of the supervisory board of the company within two years after the end of their appointment unless they are appointed upon a motion presented by shareholders holding more than 25% of the voting rights in the company. In the latter case appointment to the chairmanship of the supervisory board shall be an exception to be justified to the general meeting.

60 Elmar Gerum, Das deutsche Corporate Governance-System (Schäffer-Poeschel Verlag, Stuttgart 2007) 223.
61 Elmar Gerum, Das deutsche Corporate Governance-System (Schäffer-Poeschel Verlag, Stuttgart 2007) 235.
3.2.5 General functions and powers

The supervisory board has a statutory duty to supervise or to oversee the management of the corporation (Überwachung der Geschäftsführung) and the supervisory board is also responsible for supervising and overseeing the activities of the management board—these responsibilities cannot be delegated. It is important to note that these responsibilities are joint responsibilities of the whole supervisory board and cannot be exercised by individual members or by the employee or shareholder representatives only. The supervisory board, or the articles of incorporation, may require that the management board must obtain the approval of the supervisory board for specific matters (it effectively has a right of veto on these matters), but managing the business of the corporation cannot be delegated to the supervisory board or any committee of the supervisory board. Just to emphasise the respective functions of the supervisory and management board, it should again be stressed that the function of managing the business of the corporation belongs exclusively to the management board. The management board has almost unlimited powers to manage and direct the business of the corporation.

3.2.6 Appointment and removal of management board members

The supervisory board’s right to appoint and remove members of the management board forms one of the cornerstones of the two-tier system. It is hailed as one of the most effective ways of actively influencing policy decisions in public corporations and appointment of...
management board members is seen as one of the most important tasks fulfilled by the supervisory board. A distinction is made between the power to call (Bestellung) a person to take up an office in the management board (as organ) and the appointment (Anstellung) of such a person. It is the acceptance of the call to take up the office of management board member that would make the person a member of the management board as organ and thus an office-bearer. However, the appointment is done by way of a contract of appointment and it is this contract that will regulate the contractual relationship between the management board member and the corporation – as such, a member of the management board is not an employee, but an office-bearer.

It is mentioned in the GCGC that the supervisory board can delegate to committees (the plural is used) the task of assisting with the preparation of the call to become a member of the management board (die Vorbereitung der Bestellung) and that these committees can also deal with the conditions of the contract of appointment, including compensation. It is important to note that these provisions are not ‘comply or explain’ provisions. As explained above, these committees cannot ‘call’ a person to become a management board member as the ‘calling’ to become such a member is an exclusive power of the supervisory board and that power cannot be delegated. These committees should not be confused with the nomination committee (required under Article 5.3.3 of the GCGC) or the Audit Committee (required under Article 5.3.2 of the GCGC) of the supervisory board. As far as the supervisory board’s nomination committee is concerned, it should in particular be noted that it has nothing to do with the appointment of management board members. This nomination committee of the supervisory board (only consisting of shareholder representatives) deals with the nomination of shareholder representatives to the supervisory board.

3.3 The management board

3.3.1 Necessity and composition

Every German public company must have a management board. In accordance with the basic principle that the supervisory and management functions must be separated, the

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73 Ibid 40, para 45.

74 Art 5.1.2 (1st paragraph, 4th sentence) GCGC.

75 The possibility to set up an Audit Committee is now also statutorily regulated by the Bilanzrechtsmodernisierungsgesetz (28.05.2009) in § 107(3) 2 AktG.

76 This part is based on extracts from Jean J du Plessis et al, German Corporate Governance in International and European Context, Springer Verlag, Heidelberg (2nd ed, 2012) Chapters 3. This Chapters was co-authored with Prof. Dr. Ingo Saenger from the University of Muenster and I would specifically like to acknowledge his considerable contribution to this chapter.

77 This requirement arises from §§ 33, 36(1) and 37(4) AktG. See further Johannes Semler, Leitung und Überwachung der Aktiengesellschaft (2nd ed, Carl Heymanns Verlag, Köln 1996) 5; Uwe Hüffer, Aktiengesetz (9th ed, CH Beck Verlag, München 2010) 384.
management board is primarily responsible for managing and directing the business of the corporation. The appointment, removal and compensation of the members of the management board are in the hands of the supervisory board.

As general rule, there can be one or more members of the management board. However, it is also required that if the corporation was founded with more than three million Euro that the management board must consists of at least two members, unless the articles of incorporation provide differently. The corporation cannot prevent the appointment of a person designated as responsible for matters relating to labour relations (the ‘Arbeitsdirektor’—hereafter ‘personnel director’) if so required by codetermination legislation. There will, therefore, be at least two members of the management board in instances where the corporation is compelled to appoint a personnel director. A comparison between the size of management boards of public corporations (Aktiengesellschaften) in 1979 and 2004 reveals that the average size of management boards decreased slightly from 5.1 in 1979 to between 4.7-4.8 in 2004. The comparison between public corporations under codetermination and those not under codetermination shows that there is no significant difference between the sizes of management boards between them. Only 4% of the public companies analysed had management boards of more than eight members, with the highest number of management board members recorded to be 24. In the case of corporations having management boards of more than eight members, it has been noted that they occur primarily in large, highly diverged, complex and international public corporations.

3.3.2 Appointment of management board members

The members of the management board are appointed by the supervisory board for a maximum period of five years, with the possibility of reappointment explicitly built into the system. The expectation under the German Corporate Governance Code (GCGC) is that it should only be under exceptional circumstances that a member of the management board shall be re-appointed earlier than one year before the expiration of his or her current period of appointment. This is clearly aimed at ensuring that members of the management board are not effectively appointed for longer periods by terminating their current appointments prematurely (say after three years) and reappointing them for another five-year period.

| 78 | § 76(2) 2 AktG. |
| 79 | § 76(2) 3 AktG. |
| 81 | Elmar Gerum, Das deutsche Corporate Governance-System, (Schäffer-Poeschel Verlag, Stuttgart 2007) 121-122 and 420. |
| 82 | § 84(1) AktG. See Holger Fleischer, ‘Bestellungsdauer und Widerruf der Bestellung von Vorstandsmitgliedern im in- und ausländischen Aktienrecht’ (2006) 51 AG 429 et seq for further details on the appointment period and revocation of management board members. It is interesting to note that in the Draft Fifth Directive a period of six years is suggested. The relevance of this period is to ensure adequate time for a manager to establish himself, but not enough time so that he may become disinterested in proper management because of the fact that he is appointed for a long period of time. |
| 84 | Art 5.1.2 (2nd paragraph, 2nd sentence) GCGC. |
In the case of corporations where employee participation at supervisory board level is required, the process of electing the members of the management board is quite complex. In the first round of elections, the members of the management board can only be elected by a majority of two-thirds of the members of the supervisory board. If this majority is not achieved, a committee must be formed, consisting of the chairperson of the supervisory board, the deputy chairperson, a representative of the shareholders and an employee representative. This committee is allowed a month to propose names to the supervisory board for electing the remaining members of the management board. Proposals may, however, also be made by others. For the second round of elections, only an ordinary majority is required. In the case of a tied vote, the chairperson is allowed a second vote for purposes of the third round of elections. In practice, the supervisory board will fill vacancies on the management board in close collaboration with the serving members of the management board, including the opportunity for the management board to indicate what type of qualifications the new management board member should have. The management board is not allowed, without close consultation with the supervisory board, to identify an appropriate candidate, to fill vacancies or to negotiate with such candidates. That function is and remains the function of the supervisory board.

### 3.3.3 Requirements to ensure diversity in management board composition

The GCGC now requires supervisory board to respect diversity and, in particular, to give proper consideration to the appointment of women (insbesondere eine angemessene Berücksichtigung von Frauen anstreben) on the management boards of listed companies. In addition, the GCGC expects of the management board, in filling managerial positions, to take diversity into consideration and, again in particular, give proper consideration to the appointment of women. It is clear that the GCGC strives to increase the number of women sitting on management boards, on supervisory boards (see discussion above) and holding non-board managerial positions. This should be seen against a broader political agenda.
That is namely that in 2009 the German Federal Government also announced its intention to ensure a proper representation of women in Germany’s corporate world by announcing a staged plan to ensure proper female representation in managerial and supervisory positions in German companies.95

3.3.4 Functions and powers

The management board’s primary responsibility is to direct the corporation (die Gesellschaft zu leiten).96 It is quite interesting to note that in sharp contrast with Section 76(1) of the AktG which makes directing the corporation a specific responsibility of the management board, Section 77(1) of the AktG only mentions indirectly that if there is more than one member of the management board, all members of that board are jointly responsible for managing the business of the corporation (Geschäftsführung).97 It is, therefore, by way of inference that commentators say that the management board is responsible for ‘managing the business of the corporation’ and for ‘directing the corporation’.98 Thus, it is simply accepted nowadays that the management board is responsible for ‘managing and directing the business of the corporation’ and we also use these words as we see them as correctly describing the primary responsibilities of the management board.

Generally speaking, managing the business of the corporation is exclusively a responsibility of the management board,99 excluding direct interference over these matters by the supervisory board or the general meeting.100 The power to manage and direct the business of the corporation is seen as an original and inalienable power of the management board, meaning that it is not derived from the supervisory board or the general meeting and this power to manage the business of the corporation cannot be delegated.101 There are specific statutory provisions prohibiting the delegation of the power to manage and direct the business of the corporation to the supervisory board102 or to any other person or organ.103

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96 S 76(1) AktG. The phrase ‘die Gesellschaft zu leiten’ can also be translated as ‘the corporation to lead’, but it was considered to be more appropriate to use the better known Anglo-American terminology of ‘directing the corporation’.

97 S 77(1) AktG.

98 Uwe Hüffer, Aktiengesetz (9th ed, CH Beck Verlag, München 2010) 384.

99 This is beyond dispute because of ss 77(1), 76(1), 78 and 82(2) read together.


102 S 111(4) AktG. See further Uwe Hüffer, Aktiengesetz (9th ed, CH Beck Verlag, München 2010) 598-602.
respective statutory powers of the various organs of the corporation are seen as powers given
to these organs exclusively, making it, as general rule, impossible for the general meeting to
challenge the validity of resolutions taken by the management board or the supervisory board
within the scope of their exclusive powers.\textsuperscript{104} There are, however, a few very important
qualifications that need to be taken into consideration as far as the powers and functions of a
management board is concerned.\textsuperscript{105}

3.4 \textit{Summary and analysis}

The two tiers of the German board, namely the supervisory board and the management board,
are dictated by legislation for public corporations and private companies employing more
than 500 employees. Employees must be appointed on the supervisory board of certain
corporations and companies, also called codetermination or employee participation at
supervisory board level. For these companies such employee representation is also dictated
by legislation. The number of employees sitting on supervisory boards vary according to
some rather technical distinctions, which can only be explained or even justified on historical
grounds. In means that the actual impact of employees have on supervisory boards may vary
depending on whether one-half or one-third of the supervisory board consists of employee
representatives. In addition, in cases where there are legislation requiring that half of the
supervisory board must be made up of employees, the actual impact of employees will be
determined depending whether the chairperson is appointed by shareholders or whether it is a
neutral person appointed by both the shareholder and employee representatives on these
boards. However, it is very clear that in Germany employee representation at supervisory
board ensured board diversity for many years and long before board diversity became a ‘hot
topic’ over the last 10 years or so in company law systems adhering to a unitary or one-tier
board system. It should also be remembered that even at management board level employees
are guaranteed representation in companies where a personnel director (\textit{Arbeidsdirektor})
must be appointed.

Over the last 10 year or so promoting further board diversity also became fashionable in
Germany. In particular as far as gender diversity is concerned, but again the drive for
diversification of German boards also focuses on cultural diversification, in particular
appointing more non-German on their boards. The diversification process in Germany is
slightly more complex, because both boards are affected. The lack of females in supervisory
and management boards is conspicuous.

It is clear that the GCGC strives to increase the number of women sitting on management
boards, on supervisory boards and occupying non-board managerial positions. This should be
seen against a broader political agenda. That is namely that in 2009 the German Federal
Government also announced its intention to ensure a proper representation of women in
Germany’s corporate world by announcing a staged plan to ensure proper female
representation in managerial and supervisory positions in German companies. All these
developments together will ensure that in a number of years the role that women might play
in the corporate world in Germany will probably be considerable.

\textsuperscript{103} Ingo Saenger, \textit{Gesellschaftsrecht} (Verlag Franz Vahlen, München 2010) 295.


\textsuperscript{105} See Jean J du Plessis et al, \textit{German Corporate Governance in International and European Context}, Springer
Under-representation of women on boards: Voluntary codes, mandatory legislation and reasons

The debate on board diversity is dominated by gender diversity. This is so because there is ample evidence all over the World that women are totally under-represented on boards and there is probably not a single country in the World where this is still not true. In countries like Norway, Spain, Switzerland, France, Israel and the Netherlands, where mandatory quotas are required through legislation, this will probably change over the next few years. However, in most other countries, especially western countries, there are serious attempts through voluntary codes of good governance to improve female representation on company boards. It was shown above that both in Australia and in Germany the process of appointing more women as employees, executives and directors are taken seriously. Also, there is considerable investor pressure on companies to get the gender balance on their boards right. Thus, it is to be expected that more women will definitely be appointed to company boards in future – as will be seen below, this trend has already started.

The reasons for the low number of women serving on board are explained differently. The most basic explanation is that company boards always have been dominated by middle-aged men. As board appointments are normally done on invitation, the old boys’ clubs would always bring in theirs ‘friends, mates and buddies’ – trying to clone and thus perpetuating the evil! However, the matter is probably more complex than that. There are fewer women in senior managerial and senior executive positions and fewer women serving as CEO’s. Thus, the argument is that the pool from which women board members is selected is simply smaller than the pool of men. The question then is why? Also here the simple argument is that there has always been discrimination against women – they would hardly ever be picked for senior executive positions over men in a male-dominated environment. Yet, another reason for the under-representation of women in senior management, senior executive or CEO positions is that women often takes the primary responsibility of raising children, which may make the


107 In Norway, the country that took the lead in 2005 to legislate for mandatory female quotas, it was shown that by the end of 2010, 31.9% of the positions on the largest ASA company boards were filled by women, while 35.6% of such positions were filled by women in a sample of 25 listed companies researched by Deloitte – see Deloitte, Women in the Boardroom: A Global Perspective (November 2011) <http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Nominating-Corporate%20Governance%20Committee/Board%20Composition%20and%20Recruitment/Women%20in%20the%20Boardroom_Deloitte_111511.pdf> at 21. Thus, although not at the required aspiration of 40% women on boards by 1 January 2008, the percentage is significantly higher than in any other country Deloitte included in their study.

additional responsibility of taking up additional highly stressful managerial and executive positions less attractive for many women. However, as far as I know, there is no empirical data that support this claims.

One thing is certain, over the last 15 years or so, the debate of female representation on boards has been seen in context of the broader debate of board diversity. It is now well-recognised that there are advantages in having a board where there is diversity as far as race / ethnic background, nationality, gender, age, industry experience, and educational, functional and occupational backgrounds, are well-recognised. The advantages of a diverse board include promotion of a better understanding of the marketplace, increased creativity and innovation, effective problem solving, enhanced effectiveness of corporate leadership, expanding global relationships and avoiding the dangers of ‘group-think’ in a homogeneous board. However, what is exactly considered to be a board with a well-balanced composition and whether there is a ‘business case’ to be made out for board diversity, are complex issues with no clear answers and diverging views based on a wide variety of different criteria to determine what is meant by ‘diversity’ and ‘business success’.

Time and space make it impossible to go into this in detail, but there are numerous reasons why having more females on boards are advantageous. Apart from the more general advantage that it feels better as it is ‘the right thing to do’, there is apparently ‘evidence from the US that companies with more than three women on their boards performed significantly better than those that didn’t’, while a Research Report from Goldman Sachs suggests that achieving gender balance in the workforce could increase Australian Gross Domestic Product by 11 per cent. It has also been pointed out that female board members

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may have a better understanding of consumer behaviour, the needs of customers, opportunities for companies to meet that need and that they more likely to be ‘independent’ as they would not come from the ‘old boys’ network. However, research on whether there definitely is a negative or positive relationship between the proportion of women on boards and company performance is still inconclusive. Wang and Clift refer to several studies on the link between the proportion of women on board and financial performance of companies and conducted their own research based on data they collected and analyse, but the conclude that ‘there is no strong relationship between gender and racial diversity on the board and financial performance’. This is not totally unexpected as the criteria used for these studies differ and the circumstances and complexities of business is such that a final conclusion will probably never be reached. There are, however, some that rather focus on the ‘extensive research’ that show that there is ‘a correlation between the financial bottom line and the proportion of women on boards or in senior management’.

It will provide for interesting research to compare current perceptions of directors along gender lines: How male directors perceive other male directors; how female directors perceive other female directors; and then how the two groups perceive directors from the other sex. Also, it would be interesting to research the perception of two randomly-selected groups of men and women who are non-managers, non-executives and non-directors and try to establish how they perceive male and female directors respectively. It would then be interesting to monitor any changes in perceptions over say a 10-year period. This idea was prompted by indications that male directors still are adverse to promote the idea of board diversity and that it is probably linked to their perception that there should not necessarily be more females sitting on boards. Nicole Sandford provides this interesting example in 2011 of directors in America:

At a recent director education program hosted by a major university, the nearly 100 public company directors in attendance were polled on whether they believed diversity was an important consideration for board composition. The nearly all-male audience response was disheartening – approximately 70% sad “no”. A familiar conversation ensued: We want the best athlete and shouldn’t be restricted by diversity: we believe diversity of thought is the most important factor. This view may have to change in the face of marketplace and investor pressures.


Thus, if the research above is undertaken, it is to be hoped that in 10 years time there will not only roughly be an equal number of male and female attending a similar educational program, but that the advantages of board diversity will then acknowledged and that the male directors will also acknowledge the invaluable contributions that female directors make to boards.120

5 Concluding remarks

The research undertaken shows that in both Australia and in Germany the debate on board diversity is seen wider than just a debate on gender diversity. Cultural, race, age, stakeholder and nationality diversity also form part of the debate. In Australia and in Germany there are efforts made through voluntary codes of conduct to ensure that board diversity is strived for. Gender diversity is a particular focus in both jurisdictions. In Germany, where a two-tier board system is mandatory for several types of companies, it is also mandatory to have between one-third and one-half of the supervisory board filled by employees of most companies where a two-tier board is required. This system of supervisory codetermination by employees ensures that an important form of board diversity is achieved and that adds a distinctive element to these German boards that is not present in Australia or other corporate governance models where the unitary board is the norm. The system of codetermination has in recent years been hailed in Germany as an important reason why Germany recovered quicker from the Global Financial Debt and is still in a better position than most other European countries still under thread of the European Debt Crisis. Australia escaped, to a large extend, the Global Financial Crisis. The reasons for that are multiple, but it is unlikely that board diversity or the lack of board diversity contributed to that.

It is not difficult to predict that in both Australia and in Germany there will be more women appointed to senior executive positions and on boards in future. What the actual effect of that will be from a business point of view is impossible to predict. However, that women will have a bigger say in corporate Australia and corporate Germany in say five years time, is beyond dispute. In fact, this brings with it a huge responsibility on women to live up to the expectations that an improved gender balance will lead to improvements – what exactly these improvements are and whether the business case for appointing more women in senior executive positions and on boards will emerge clearly is something that only time can tell.